September 16, 2009

Mr. Gerard J. Thibeault, Executive Officer via Electronic Mail

California Regional Water Quality Control Board, Santa Ana Region

3737 Main Street, Suite 500

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RE: Supplemental Comments on Tentative Order No. R8-2009-036 – Draft San Bernardino County MS4 Permit, Fact Sheet, and Monitoring and Reporting Program

Thank you for the opportunity to provide supplementary comments on the Draft Areawide MS4 NPDES Permit for San Bernardino County within the Santa Ana River Watershed (Draft Permit). The San Bernardino County Flood Control District (SBCFCD) provides these comments as the Principal Permittee, on behalf of all the San Bernardino County Permittees.

This letter and Attachments include comments regarding several permit sections, including:

Coverage and requirements for "de minimus" discharges;

Further comment on the inclusion of effluent limits in the Draft Permit;

Proposed alternative approach to achieve the objectives of the WAP;

WQMP, CEQA, and 401 Certification Coordination;

Economic considerations;

Glossary terms and definitions;

As before, in this letter we are providing a narrative explanation and detailed rationale for proposed revisions, and providing attachments with specific language suggestions as appropriate. We have also included a markup/comment version of the Draft Permit (Attachment 1) that include numerous edits and suggested corrections, and a table that itemizes specific comments and suggested revisions (Attachment 2). And, as before, we request that a comprehensive evaluation be conducted to ensure that the language in the Draft Fact Sheet, the Draft Permit, and the Draft Monitoring and Reporting Program is consistent within each document and among all of these documents.

DE MINIMUS DISCHARGES FROM PERMITTEE OWNED AND/OR OPERATED FACILITIES/ACTIVITIES

For Permittee-owned and/or operated facilities, we understand that the Draft Permit is intended to provide NPDES permit coverage for the de minimus discharges specified in

Order R8-2009-0003 (the "de minimus permit"), in lieu of the coverage under the de minimus permit. As stated in Order 2009-0003 (Section I.B.1: Regulatory Approach):

> "However…certain types of municipal separate storm sewer system (MS4) permittee discharge activities will no longer be regulated under this Order but will be regulated under the area-wide MS4 permits when these permits are updated appropriately and renewed during the early part of 2009."

The rationale for this approach is provided, in part, in Order 2009-0003:

Fact Sheet, Section III.B: Rationale:

> "These De minimus discharges, which in many cases consist of potable water, are or can be regulated under the area-wide MS4 permits or other waste discharge requirements. **This approach streamlines the regulatory process for these dischargers"** (emphasis added).

However, we have questions and concerns about how the de minimus discharge provisions are incorporated into the Draft Permit in Section V.B. The present wording is confusing in that it appears to encompass de minimus discharges, other than those from the Permittees' own facilities. For example, the items specified in Section V.B.1 through 7 appear to apply more broadly to all discharges--not just de minimus discharges from Permittees' own facilities. For example V.B.2. provides that discharges from lawn, greenbelt and median areas "shall be minimized through public education and water conservation efforts. Also see Section X.E. Residential Program." This description is inconsistent with Permittees' understanding of this section.

Similarly, there are other inconsistencies between the draft Permit and Order 2009-0003, which do not seem to square with the stated purpose for regulating MS4 Permittee de minimus discharges through the Draft Permit (e.g., to streamline the process). In that regard, the first sentence of Section V.B states that "The Permittees shall prohibit the following categories of non-storm water discharges (de minimus discharges) into waters of the U.S. from Permittee-owned and/or operated facilities." Yet, Order 2009-003 specifically provides that discharges to waters of the U.S. and not to the MS4 "may continue to be regulated under [the de minimus permit]." (Fact Sheet, Attachment F to Order 2009-0003). The Draft Permit also introduces confusion regarding exactly what de minimus discharges are regulated; whether they are discharges to the MS4, from the MS4, or to surface waters or waters of the U.S. (see, for example, Sections V.A and X.V; and Sections V.B.6 and V.B.6.a).

In addition, permit coverage as described in Order 2009-0003 (Section II.E) is terminated once regulatory coverage is transferred to another NPDES Permit or WDR:

> "If the Regional Water Board issues an NPDES permit or WDRs, the applicability of this Order to the specified discharge is immediately terminated on the effective date of the NPDES permit or WDRs."

Yet, the Draft Permit appears to require the Permittees to continue to comply with certain provisions of Order 2009-0003 (such as the monitoring and reporting

provisions). These inconsistencies raise a number of questions: Precisely what permit provisions apply to the de minimus discharges once the Draft Permit is adopted? If the intention is basically to transfer coverage of the specified discharges, can the Draft Permit still reference the provisions, in whole or in part, of Order 2009-0003? If the intent is to regulate de minimus discharges from Permittees' own facilities in the Draft Permit (instead of in Order 2009-0003), we believe it creates too much confusion and will not streamline the existing approach. Accordingly, we propose that the de minimus discharges **continue to be** regulated under Order 2009-0003 and that only a reference to this fact be included in the Draft Permit.

Also, Section V.B.1 through 7 incorporates conditions that are not presently contained within the de minimus permit (e.g., planned discharges shall be declorinated to a concentration of 0.1 ppm). These also include added provisions to address hydrologic conditions of concern (HCOCs) and erosion, and a requirement to minimize various forms of irrigation runoff, specifically through "public education and water conservation efforts," among other things. While we understand that HCOCs and water conservation are important considerations in the watershed, there are already permit provisions and programs in place to address these issues. Specifications for consideration of HCOCs are explicitly addressed in Section XI.E.6 of the Draft Permit, and in the current, Regional Board approved, WQMP Guidance. Because these discharges, by their nature are de minimus, which is defined as "posing an insignificant threat to water quality," we disagree with these "stated conditions" to the extent they are not presently part of the de minimus permit.

CONCERNS REGARDING SPECIFICATION OF NUMERIC EFFLUENT LIMITS

The Waste Load Allocations (WLA) developed pursuant to the nutrient and phosphorus TMDLs are "expressed as effluent limits" in the Draft Permit (see Section V-D-1 on pg. 44 and Section V-D-2 on pg. 46). The Draft Glossary defines "effluent limitations," in part, as limitations of the quantity and concentrations of pollutants in a discharge (see Draft Permit, Attachment 4, Page 100).

In previous written comments, the Co-permittees recommended that the Regional Board require MS4s to adopt Best Management Practices in order to implement the TMDL rather than impose numeric effluent limits at this time. The difficulties and infeasibility of imposing numeric effluent limits for storm water discharges, at this time, are highlighted by the fact that in order to adopt and implement appropriate limitations, the following factors would have to be addressed:

1) The permit would need to specify the official points-of-compliance and the frequency of water quality sampling needed to assess conformance with the effluent limit(s).

2) The effluent limit(s) would have to reflect the Regional Board's finding that "Certain activities that generate pollutants present in storm water may be beyond the ability of Permittees to prevent or eliminate. Examples of these include…bacteria from wildlife... and leaching of naturally occurring nutrients and minerals from local soils. This Order is

not intended to address background or naturally occurring pollutants or flows" (See Section I-C on pg. 6). As written, the Draft Permit limits the total concentration of bacteria and total mass of phosphorus flowing from MS4 facilities into waters of the U.S. without regard for whether these pollutants originated from natural or other uncontrollable sources.

3) The effluent limit(s) would have to reflect the Regional Board's finding that the "Permittees lack legal jurisdiction over storm water discharges into their systems from State and federal facilities, e.g. schools and hospitals, utilities and special districts, Native American tribal lands, wastewater management agencies and other point and non-point source discharges [CalTrans, dairies, etc) otherwise permitted by the Regional Board. The Regional Board recognizes that the Permittees should not be held responsible for such facilities and/or discharges" (See Section I-B on pg. 6). As written, the Draft Permit limits the total concentration of bacteria and total mass of phosphorus flowing from MS4 facilities into waters of the U.S. without regard for whether these pollutants originated from urban sources outside the Permittee's legal jurisdiction. For example, there is evidence that bacteria discharged in treated wastewater effluent can be a source of pathogen indicators (Attachment 3). Present test methods do not discriminate between these and other sources.

4) The effluent limits for bacteria are specified as both a geometric mean and a 10% maximum exceedance value. The latter is significantly more restrictive than the former and is inconsistent with U.S. EPA's 1986 water quality criteria guidance for bacteria. We recommend that only the geometric mean values be used as effluent limits. The Regional Board may use U.S. EPA's recommended procedures for evaluating single sample maximum concentrations when insufficient data is available to calculate a proper geometric mean.

5) The effluent limits are expressed as maximum concentrations or quantities without regard for whether there is any practicable means to achieve such values. This is contrary to the Regional Board's stated intent to achieve compliance by requiring discharger to implement Best Management Practices to the maximum extent practicable (MEP).

CONCERNS REGARDING THE WATERSHED ACTION PLAN

The Draft Permit proposes a new requirement that the Permittee develop a "Watershed Action Plan" (see Section XI-B-3 on pg 64). The Permittees share the Regional Board's desire to develop a more integrated planning and approval process, but believe the Watershed Action Plan (WAP), as written, is largely redundant with existing efforts and other obligations described elsewhere in the permit.

As noted in the Permit Findings (see Section II-G-13 on pg. 27), the Permittees have developed a GIS-based mapping tool to aid in managing the stormwater program. In

addition to depicting all of the stormwater channels and streams throughout the watershed, this tool is designed to identify those waterbodies that are most susceptible to adverse impacts from hydromodification. This new tool provides the primary mechanism through which the Permittees intend to integrate all future efforts to manage new development, protect water quality, and coordinate the planning/permitting processes. It is more productive and cost-effective to rely primarily on the existing GIS mapping tool than to shift resources to an entirely new initiative such as the WAP.

We understand that the WAP was added to Orange County's stormwater permit at the request of the Permittees, based on facts and circumstances unique to Orange County. We also understand that this was done to recognize and support a settlement agreement between the cities in Orange County and various NGOs.

We are particularly concerned that the Regional Board directs the Permittees to form a Technical Advisory Committee (TAC) and specifies the municipal staff positions that must participate (see Section XI-B-2 on pg. 64). It is up to the Permittees to determine whether or not a TAC is needed and who should serve on that committee. Nor may the Board stipulate which governmental and non-governmental agencies the MS4s must consult when preparing a program implementation strategy (see Section IX-B-3-j on pg. 65). Such obligations are already established in other federal and state laws (including CEQA). It is inappropriate for the Regional Board to specify the method(s) of compliance.

In addition, the proposed permit instructs the Permittees to "integrate…water conservation and re-use…with land use planning policies and ordinances" (see Section XI-B-3-c on pg. 64). Such requirements, along with similar mandates to "incorporate … Smart Growth principles and New Urbanism" exceed the Regional Board's authority to reduce pollution by regulating the discharge of waste into waters of the state (see Section XI-B-3-g on pg. 65). And, while it is permissible for the Regional Board to establish and enforce water quality objectives for total suspended sediment, it is unreasonable for the Board to require dischargers to prepare a report to "address sediment yield and balance on a watershed, subwatershed and regional basis to ensure that sediment supply is appropriate for post-development flow" (see Section XI-B-3-d on pg. 65).

Finally, the draft text regarding the WAP imposes a new obligation to implement "control measures to minimize the impact of urbanization on water quality" in advance of a properly approved TMDL (see Section II-F-5-d on pg. 18 and Section II-G-16 on pg. 28, Section II-F-4 on pg. 16 and Section XI-B-3-e on pg. 65). The Permittees have worked closely with the Regional Board to develop appropriate TMDLs and will continue to do

so. Nevertheless, it is improper to assume that the MS4s have any direct responsibility or control over some of the pollutants named on California's 303(d) list (see Section I-C on pg. 6). For example, Big Bear Lake is listed for both PCBs and mercury contamination. However, PCBs have been banned from production for more than 30 years and the best scientific data indicates that mercury pollution is caused almost entirely by airborne deposition. The Regional Board should not require MS4s to undertake any special measures to control such pollutants prior to conducting a public hearing to adopt a TMDL with an urban wasteload allocation. In the meantime, the MS4s will continue to implement a wide range of BMPs designed to minimize erosion and urban runoff. These efforts are expected to help reduce all pollutant loads, including PCBs and mercury, flowing into local lakes and streams.

Many of the more substantive provisions of the proposed Watershed Action Plan are well-defined elsewhere in the permit (see Section VI on pg. 50-51). Specifically, the Permittees are committed to revise the MSWMP and WQMP procedures to include Low Impact Development as the primary means of managing hydromodification. As noted earlier, the MS4s intend to use the new GIS mapping tool to do things like: indentify sensitive stream habitats, overlay HCOCs, site regional BMPs, locate areas with impervious soils or contaminated groundwaters that may preclude stormwater infiltration, etc. We also intend to integrate the GIS mapping tool with a large library of relevant documents (Basin Plan, TMDLs, recommended BMPs, etc) so that end-users can quickly access critical resources much earlier in the planning/permitting process.

As stated in the ROWD, the Permittees strongly support a program approach that is Risk-based, Outcome-oriented and Compliance-focused. To that end, most of our effort over the next permit period will be dedicated to implementing the nutrient and bacteria TMDLs previously approved by the Regional Board because these represent the highest water quality priorities. The Watershed Action Plan will shift scarce resources away from meaningful program implementation back to a less useful planning exercise.

We recommend that the requirement to prepare and submit a Watershed Action Plan be deleted from the permit (including related references in the M&RP). And, in its place, the MS4s will proceed with Phase II of the current effort to implement the GIS mapping tool.

In addition, the Permittees have no objection to retaining Section XI-C (beginning on pg. 66) which requires the MS4s to consider Watershed Protection Principles as part of the CEQA planning process. Thus, the MS4s believe we can achieve the Regional Boards goal of a more integrated stormwater management strategy without implementing the Watershed Action Plan contemplated by the Draft Permit.

WQMP, CEQA, AND, 401 CERTIFICATION COORDINATION

The Draft Permit specifies that Permittees "shall require submittal of a preliminary project-specific WQMP" (Section XI.D.3) and that, "the need for a project shall be identified early in the CEQA review to enable coordination with Regional Board 401 staff on the preliminary WQMP prior to City/County approval of the WQMP" (Section XI.C.2). These requirements were designed to prevent problems associated with 401 Certifications that were applied for after a project was well underway, such as BMP retrofits. The Permittees can advise project applicants about the 401 program requirements as early as possible within the development review process, and potentially require preliminary WQMPs as appropriate. We request clarification regarding how "early in CEQA review" is expected. However, it would be problematic to involve Regional Board staff in their internal development review and approval process, or to provide the expected or required review turnaround timeline if a 401 review is inserted into the process. The Permittees are being asked to integrate their various departments involved in project planning and review (Planning, Engineering, Building and Safety, Public Works) process to improve project design and implementation of watershed objectives. Therefore, the Permittees request a complementary interdepartmental integration between the Stormwater and 401 Certification Programs at the Regional Board. Regional developers, local jurisdictions, and regulatory agencies would benefit from such integration. As a first step, we request that Regional Board 401 staff participate in the review and approval of the WQMP Guidance and Template as required by the Draft Permit. The objective is to have a consistent compliance standard for development projects in the Permit area. Basically a well developed WQMP should suffice to satisfy the requirements of a 401 Certification.

ECONOMICS

We briefly described the significant economic constraints that have arisen since we initially submitted our ROWD in October 2006. The Permittees understand that the economic conditions will change and expect an overall improvement in the next few years, but the actual timing and level of improvement is very uncertain. The Permittees are not asking to ignore implementation needed to protect water quality. Rather, they are asking to prioritize the Draft Permit tasks and use their limited resources to implement highest priorities first. And, as described in our September 9 letter, some of the required tasks have interdependencies, and would be most effective if they were executed in a logical order, instead of being mostly "front-loaded."

DRAFT GLOSSARY

Attachment 4 to the Draft Permit contains a "Glossary" of terms. In addition to the Glossary, several terms also are defined in the body of the Draft Permit. In some

instances, the definitions in the body of the Draft Permit are not entirely consistent with the definitions in the Glossary (*see, e.g.,* the definition of MEP, which is contained in the Glossary and in footnote #5). As a result, to avoid confusion, Permittees believe the definitions should be contained either in the Glossary or in the body of the Draft Permit, but not in both. Further, in general, many of the definitions are unnecessarily complicated and include examples and explanations that could inadvertently impose requirements on Permittees above and beyond those set forth in the Clean Water Act or the Porter-Cologne Water Quality Control Act (*See, e.g.,* Best Available Technology, Effective Impervious Area, Effluent Limitations, Low Impact Development, MEP, to name a few).

Schedule Clarification

Please note that Gantt chart version of our alternative schedule, submitted September 9, 2009 had an error regarding the LIP implementation dates. We are proposing that the area-wide Model LIP would be due within 6 months of Permit adoption and the Permittee-specific LIPs would be adopted 12 months later—18 months after Permit adoption.

If you have questions regarding these comments, please contact me at (909) 387-8112.

Sincerely,

Matt A. Yeager

Stormwater Program Manager

Attachments:

1. Permit Markup
2. Permit Comment Table
3. Litton et al, 2009 (Microbiological impairment of urban rivers and streams: role of sediment and wastewater effluent)
4. Proposed Changes to Glossary